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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of GERALD H. and BATIA FISHER .	
GERALD H. FISHER, Appellant, v. BATIA FISHER, Respondent.	G040763 (Super. Ct. No. D 29143) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Michael J. Naughton, Judge. Affirmed.

Hickman Carrillo, Gale P. Hickman and Olivia Carrillo Hickman for Appellant.

Phillips, Whisnant, Gazin & Gorczyca and Gary S. Gorczyca for Respondent.

* * *

In this case, a husband tried to modify a marital settlement agreement regarding possession of the family home; the settlement agreement had already been incorporated into an interlocutory judgment of dissolution more than five years earlier. But he tried to do his modification on the cheap: in a one page document on onion skin paper, without the wife having counsel, and he also forgot to date the document. More importantly, he didn't bother to file this modification with the court so that it would affect the operative interlocutory *judgment* then in effect, or the upcoming final judgment of dissolution.

As it turned out, there was nothing in the final judgment of dissolution that effectuated the modification. Thus, when the issue of the modification came up in Spring 2008, the trial court was faced with a clear conflict between what the final judgment of dissolution provided, and what the one-page undated onion skin modification provided. Given the conflict, the final judgment controls. We will therefore affirm the trial court's order denying the husband's attempt to enforce the undated onion skin "modification."

I. BACKGROUND

A. The 1971 Judgment Incorporating the 1970 Marital Settlement Agreement

Back in 1971, Gerald (who also goes by the name of "Gershon") and Batia Fisher got a divorce. That is, they got an "interlocutory judgment of dissolution of marriage" which not only terminated the *status* of marriage, but divided property according to a "marital settlement agreement introduced into evidence." The marital settlement agreement itself was even older, dated June 4, 1970.

The 1970 marital settlement agreement essentially split the family home on Stanford Avenue in Garden Grove in two by creating two equal tenancies in common, his and hers. But Batia got to keep living in the house while Gerald made the mortgage payments on it.[1] Batia *also* got $200 in spousal support per month, along with $150 per

[1] We now set out the details of the 1970 agreement incorporated into the 1971 interlocutory judgment:

month for the two children of the marriage, Dale and Michael, and payment of $350 toward her attorney fees.[2] In 1971, Dale was eight years old, while Michael was six.

For some reason, however, when the interlocutory judgment was finally filed in August of 1971, it provided that spousal support was to be only $1 per month, which would continue -- and we quote the language exactly here because it doesn't quite make sense on its face: "until the death or remarriage of wife or until July 1, 1975, or until wife vacates the previous described in the Marital Settlement Agreement, whichever shall first occur."

The most logical reading of the sentence -- "vacates the previous described" [whatever?] -- is that it was probably referring to the Garden Grove home. What else *could* she "vacate"?

Thus, the status quo as of the filing of the interlocutory judgment was that Batia could continue living in the home indefinitely, subject only to two conditions, each under her unilateral control: Her remarriage or her own abandonment of the home.

Paragraphs 7 and 8 each created reciprocal tenancies in common, which were "subject to terms and conditions concerning possession, use and sale thereof as is more fully set forth in Paragraph 9-14of [sic] this Agreement." The terms and conditions of paragraphs 9 through 14 were:

Upon the earliest occurrence of three conditions, either party "may promptly notify the other in writing that such party has a desire to purchase the other party's interest in the property" [i.e., the other's joint tenancy interest created in paragraphs 7 and 8]. The three occurrences were: [¶] "As long as the wife shall desire to remain on the property listed in Exhibit 'A' it may not be sold without her consent." [¶] "Remarriage of Wife." And [¶] "With respect to the property described in Exhibit 'A', abandonment of the property by Wife."

Paragraph 10 spelled out what would happen when both parties "agree that the property shall be sold or the contingencies in Paragraph 9 occur," which was essentially a bid system.

Paragraph 11 addressed the scenario of what would happen "If only one party indicates a desire to purchase the property subject to the terms of Paragraph 9." In that case, then there would be an appraisal system, leading to the forced sale. [The "subject to the terms of Paragraph 9" language clearly indicates a protection of wife's right to remain in the property subject to remarriage or abandonment.]

Paragraph 12 provided for sale if neither party expresses such a desire within ten days after receipt of a written request for such notification. In that case that the "property shall be placed on the open market for sale."

Paragraph 13 was only one sentence, and clearly provided that: "Wife may continue to reside in the residence described in Exhibit 'A' only for so long as she is unmarried and has any legal interest in the property."

Finally, paragraph 14 provided that for so long as the property would be in the name of both "Husband and Wife as Tenants in Common, Husband shall make all mortgage payments thereon, including the payment of taxes and insurance; and Husband shall hold Wife harmless therefrom."

[2] Paragraph 21 required Husband to pay Wife $150 for each child in child support and paragraph 22 required $200 a month in spousal support. Wife had her own law firm, (Garber, Sokoloff & Van Dyke, Inc.) and Husband paid them $350 for their services to her.

B. The 1977 Modification

Sometime -- probably around March 1, 1977 -- the exact date is not in the record, but it was probably around March 1, as we explain below-- Gerald (now calling himself Gershon) and Batia signed a one-page onion skin document which began with the words, "This is to affirm the voluntary modification of the divorce settlement of Gershon Fisher and Batia Fisher."

There is a photocopy of the onion skin document in our record, but it is barely legible. (One can see, in the lower right hand corner, what appears to be the signatures of Gershon Fisher and Batia Fisher.) Gerald would later provide the court with a legible typed up translation of the document. The document consists of three paragraphs, of which we have already quoted the first. The second and third paragraphs are: "As of September 1, 1976 Gershon Fisher agrees to raise the child support payment of Michael Fisher from $ 150.00 to $ 200.00. As of September 1, 1976 Batia Fisher agrees to waive support for Dale Fisher since she is residing with Gershon Fisher. [¶] Gershon Fisher also agrees to provide as a loan additional monies up to $100.00 per month in order to cover the mortgage payment on 5882 Stanford Avenue, Garden Grove, California, and provide for other small expenses. This loan will be interest free and will be repaid upon the sale of the house. The sale of the house will be accomplished as per the original divorce agreement upon the remarriage of Batia Fisher, or the vacating of the house by Batia Fisher and/or Michael Fisher."

The modification thus changed the marital settlement agreement already incorporated into the interlocutory judgment of more than five years previously, by triggering the sale provisions "upon the remarriage of Batia Fisher, or the vacating of the house by Batia Fisher and/or Michael Fisher."

On the same document followed two lists of money "loan"[ed] by Gershon: The first was a list of monies in the months of September 1975, September 1976, October 1976, and November 1976. The payments in this column (with the exception of $50 for September 6, 1975) are regular: literally alternating amounts of $35 and $65, and no payee is listed.

The second was a list of amounts which listed payees, some of whom were obviously vendors and *not* the mortgagee on the Garden Grove property: $10 for Arco (January 24, 1977 plus March 21, 1977), more than $100 to Sears, and more than $200 to a man named Lowell Smith; one entry to him, enigmatically enough, lists a payment of $60 "Less $45.00 paid for TV repair."

It is noteworthy, however, that when one compares Gerald's (Gershon's) translation with the original, one finds that the original has typing all the way down to the $61.00 entry for Lowell Smith of March 1, 1977, then the final five entries (beginning with one on March 21, 1977 for Arco for $5.00) are handwritten. That is, there is no indication that Batia signed at any date *later* than March 1, 1977. By the same token, it is a reasonable inference from the last *typed* entry that Batia signed the document on or after March 1, 1977.

Also, the reference in the modification covering mortgage payments on the Garden Grove home raises a question that we should mention now (though, as it turns out, we need not address the issue of consideration), because it is not satisfactorily addressed in either side's brief: Since the 1970 marital settlement agreement *already* provided, in paragraph 14, that Gerald was to "make all mortgage payments" on the Garden Grove house, "including the payment of taxes and insurance," one wonders why he needed to "loan" up to $100 a month to "cover" mortgage payments the marital settlement agreement (apparently unaltered by the judgment) he was already obligated to make.

C. The 1977 Final Judgment

While the "modification" was signed but not dated, a final judgment of dissolution *was* filed on *March 3*, 1977. That one page document provided that pursuant to Civil Code section 4506(1)[3]: "a Final Judgment of Dissolution be entered, and that *all of the provisions of the interlocutory judgment, which was entered on August 16, 1971*

[3] The statute simply lists the grounds for divorce. It was subsequently re-enacted without substantive change in Family Code section 2310.

except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons." (Italics added.)

Nothing was "set out below." Including any reference to a modification. The space was left empty.

D. The 2008 Attempt to
Enforce the 1977 Agreement

Michael resided with his mother until 2004, when he committed suicide. Four years later, Gerald filed an OSC based on the 1977 agreement, seeking to force the sale of the Garden Grove property on the theory that Michael had, by his death, vacated the house. Batia was still living there.

Gerald's declaration actually asserted that he and Batia entered into the modification on September 1, 1976, but provided no explanation as to why the document should reference payments made as late as *May* 1, 1977. One can infer, though, that the typed document contained only entries down to March 1, and after that -- that is, *after* Batia signed the document, Gerald added other entries that he "loaned" money to her. In any event, the trial judge denied the requested relief after a short hearing without any testimony.[4] Gerald has appealed the order denying the requested relief.

II. DISCUSSION

Taking Gerald at his word, i.e., that the modification "agreement" was orally made on September 1, 1976, and perhaps *signed* by Batia on March 1 of the next year, his attempt to enforce the onion skin modification runs into this insurmountable barrier: If indeed the agreement was made *before* the March 3, 1977 final judgment, then it contradicts that final judgment with respect to the terms under which the sale provisions would be triggered. That is, the final judgment is quite clear that "all the provisions" of the 1971 interlocutory judgment are "binding."

[4] The trial court gave three reasons in the course of the hearing: (1) the "and/or Michael Fisher" clause was ambiguous; (2) treating the 1977 as a novation, the consideration for it was insufficient; and (3) that Gershon had violated a fiduciary duty he had back in 1977 under *Vai v. Bank of America* (1961) 56 Cal.2d 329.

Now, clearly the 1976-1977 modification does indeed contradict the 1971 interlocutory judgment as to the provisions which would trigger the sale provisions of the 1970 marital settlement agreement. Under the former, Michael's "vacating" the premises triggers those provisions, under the latter it does not. (We will leave aside the question of whether death qualifies as "vacating of the house.") Thus the 1971 judgment would have had to have been *itself* modified for the March 3, 1977 final judgment to incorporate the 1976-1977 onion skin modification. But it wasn't.

Now, maybe Gerald might have brought a motion to have the March 3, 1977 final judgment modified in the wake of the 1976-1977 onion skin modification. But any attempt to seek relief from the judgment under, say, section 473 of the Code of Civil Procedure, expired long, long ago.

Alternatively, if Gerald had really been on the ball, he might have made sure that the onion skin modification was incorporated into the "except as otherwise set out below" part of the March 3, 1977 final judgment. He did not do that either.

Since the final judgment left nothing for future consideration, it was in substance a final judgment (see *Lyon v. Goss* (1942) 19 Cal.2d 659, 670 [defining final judgment as leaving nothing left for consideration except compliance]). (This is a variation on Batia's theme, stressed in her brief, that the interlocutory judgment was final and beyond modification -- at least beyond modification qua judgment, as of 1976.)

And since the March 3, 1977 final judgment was not appealed, it long since became final. The trial court simply enforced that judgment when it refused Gerald's request to have a separate document, contradictory in the relevant respect to the final judgment, enforced.

Or, to put it another way, the trial court could commit no error in refusing to give effect to the modification, because the final, operative judgment would not permit him to do so.

III. DISPOSITION

Because the final judgment of March 3, 1977 is "binding," we need not address the other issues raised by the parties. The order denying the relief requested in Gerald Fisher's OSC is affirmed. Batia shall recover her costs on appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.